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**COMMONWEALTH EDISON COMPANY**

Proposal to implement a competitive  
procurement process by establishing Rider  
CPP, Rider PPO-MVM, Rider TS-CPP and  
revising Rider PPO-MI.

No. 05-0159

**BRIEF ON EXCEPTIONS  
OF THE  
COOK COUNTY  
STATE'S ATTORNEY'S OFFICE**

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**December 16, 2005**

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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

**COMMONWEALTH EDISON COMPANY)**

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procurement process by establishing Rider  
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**No. 05-0159**

**BRIEF ON EXCEPTIONS OF THE  
COOK COUNTY STATE'S ATTORNEY'S OFFICE**

The Cook County State's Attorney's Office ("CCSAO") submits the following Brief on Exceptions to the Administrative Law Judge's Proposed order pursuant to Section 200.830 of the Illinois Commerce Commission's Rules of Practice. 83 Ill. Admin. Code Section 200.830. See *also*: 05-0159, Commission Notice and Proposed Order, December 5, 2005.

**Executive Summary: Summary of the Position of the Cook County State's Attorney's Office**

On December 5, 2005 the Administrative Law Judges Proposed Order in this case was issued. The Proposed Order sets aside a long tradition of consumer protection by the ICC as well as fails to comply with a comprehensive regulatory scheme in the Illinois Public Utilities Act and other Illinois laws. Ultimately, the proposed order goes beyond the authority of the Illinois Commerce Commission ("ICC") granted to it by Illinois law.

We urge the Administrative Law Judge ("ALJ") to reconsider the positions taken and proposed findings and conclusions in the proposed order. Ultimately,

we ask the ICC reject ComEd's proposal to pre-approve the auction and rates that result for customers whose service has not been declared competitive. The ICC needs to take steps to ensure that ComEd procures power consistent with the Public Utilities Act.

This is really a common sense approach – actively regulating the price of electric power until there is a competitive declaration. At that point, the Act allows the public utility to conduct an auction as one method to obtain electric power. It is our contention that after reading Section 16-103(c) and considering that section in the context of the rest of the Public Utilities Act, it becomes clear that pre-approving an auction for customers before a competitive declaration is unlawful and beyond the authority of the Illinois Commerce Commission.

Illinois law provides for the Illinois Commerce Commission to ensure that prices are just and reasonable – as well as prudent. Traditionally, in a rate case the public utility provides the ICC with comprehensive data supporting the prices they wish to charge. Parties are allowed to intervene, review the filing and supporting data, conduct discovery and a hearing is held. This a far cry from the auction approach to pricing.

The auction as proposed will require Illinois ratepayers to pay whatever price the auction results in absent some type of misconduct or other contingency in the auction or process that leads the ICC to reject the results. This process does not comply with the Public Utilities Act. We cannot replace careful review of contracts and prices with a price set off in the future by the market under the current Illinois law. While the Proposed Order provides for a prudency review, it

is limited in ways that make it challenging to see how this will ultimately protect ratepayers. Under the auction, ratepayers would seem to be handing ComEd the equivalent of a blank check.

What follows are the various exceptions and arguments made by the Cook County State's Attorney's Office. However, in the interest of brevity we are not repeating (and are not waiving) all the various arguments that we have made in various forms throughout this case including at the hearing and in briefs. Further, in the event that the Commission decides to reject the auction, various sections of the Proposed Order would no longer be necessary.

**Exception No. 1    Procedural History: The Proposed Order Should Reflect the Administrative Law Judge's Rulings on the Various Petitions to Intervene.**

The Proposed Order lists on page 2 the various parties and refers to them as intervenors. The Proposed Order does not indicate which petitions were granted and should reflect the ALJ's ruling on the various petitions. Assuming that the ALJ has granted all the petitions to intervene then the order should be amended to include the granting of the petitions. The first full paragraph on page 2 should be amended as stated below.

**Proposed Language:**

Petitions to Intervene were filed and granted on behalf of the Attorney General of the State of Illinois (the "Attorney General" or the "AG"); Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Services Company d/b/a Ameren CIPS, and Illinois Power Company d/b/a AmerenIP, (styled collectively as "Ameren Companies"); Ameren Energy Marketing Company ("AEM"); BlueStar Energy Services, Inc. ("BlueStar"); Building Owners and Managers Association of Chicago ("BOMA"); the Citizens Utility Board ("CUB"); City of Chicago (the "City"); Constellation Energy Commodities Group, Inc. ("CCG"); Constellation NewEnergy, Inc. ("New Energy"); the Cook County



State's Attorney's Office ("CCSAO") (collectively, CUB and CCSAO are "CUB-CCSAO"); Direct Energy Services, LLC ("DES"); United States Department of Energy ("DOE"); Dynegy, Inc. ("Dynegy"); the Environmental Law & Policy Center ("ELPC"); Electric Power Supply Association ("EPSA"); Illinois Energy Association ("IEA"); Abbott Laboratories, Inc., Caterpillar Inc., Daimler Chrysler Corporation, Cognix Corporation, Enbridge Energy LLP, Ford Motor Company, and Motorola, Inc., styled collectively as the "Illinois Industrial Energy Consumers" ("IIEC"); J. Aron & Company ("J. Aron"); MidAmerican Energy Company ("MidAmerican"); Midwest Generation EME, LLC ("Midwest Gen" or "MWGen"); Morgan Stanley Capital Group, Inc. ("MSCG"); Midwest Independent Power Suppliers ("MWIPS"); Peoples Energy Services Corporation ("PES"); Reliant Energy, Inc. ("Reliant"); Local Unions 15, 51, and 702, International Brotherhood of Electrical Workers, AFL-CIO (collectively, "Locals 15, 51, 702, IBEW"); Sempra Energy Solutions ("SES"); U.S. Energy Savings Corporation ("USESC") (collectively, DES and USESC are "DES-USESC") (collectively, New Energy, DES, MidAmerican, PES, and USESC are the "Coalition of Energy Suppliers" or "CES") (collectively, all of the foregoing parties are the "Intervenors").

Proposed Order at 2.

**Exception No. 2    Need for Commission Action: The Proposed Order Should Be Revised to Include the CCSAO Comments on the Need for Commission Action and a Revised Conclusion Rejecting the Auction.**

Page 9 of the proposed order fails to include the comments of the Cook County State's Attorney's Office. ALJ Proposed Order at 9 (Section II Need for Commission Action); CCSAO Initial Brief at 4-5. Further, the conclusion should be revised to reject the auction. The Proposed Order should be revised as follows:

**Proposed Language:**

The AG argues that the Commission must also continue to regulate rates pursuant to 220 ILCS 5/ 9-101 and 9-201, and continue to enforce the other consumer protection provisions in the PUA.

The CCSAO argues that the Commission should reject the tariffs proposed by ComEd. The CCSAO noted that there were other options available to ComEd. ComEd could have requested that the ICC open a general docket examining a variety of procurement matters. Transcript at 93, lines 6-15 (August

29, 2005). Ultimately, it is ComEd's responsibility to procure power in compliance with the Public Utilities Act and to file the appropriate tariffs to recover their lawful costs. The Commission ensures compliance with the Act and that rates are just and reasonable.

The Commission concludes that it lacks the authority under Illinois law to pre-approve the auction. While ComEd's proposal for a competitive procurement method is an interesting idea, it is premature for customers whose service has not been declared competitive and is rejected as has to act upon the tariffs filed by ComEd and that action is set forth in the following sections of this order.

Proposed Order at 9.

**Exception No. 3      Background: The Illinois Electric Service Customer Choice and Rate Relief Law of 1997 – CCSAO Position: The Proposed Order Should Be Revised to Include More of the CCSAO Position**

One the significant issues in this case involves the ICC's responsibility to determine that rates are just and reasonable. See: 220 ILCS 5/9-101; 220 ILCS 5/16-111(i). In the CCSAO reply brief, the CCSAO noted that it would not be possible to determine that rates are just and reasonable within 48 hours of the auction just because the auction rules were followed. CCSAO Reply Brief at 4.

The Proposed Order should be modified as follows:

**Proposed Language:**

CCSAO argues that ComEd's tariff fails to show precisely what those costs will actually be. CCSAO contends ~~concludes~~ that ComEd's proposal ultimately requires the Commission to take on faith that the auction will result in a just and reasonable rate.

CCSAO notes that ComEd is seeking preapproval of its rates as just and reasonable through this auction docket. CCSAO argues that there is no indication from the record in this case what the rates will be, therefore, it is not possible for the ICC to determine within 48 hours of the conclusion of the auction that rates are just and reasonable just because the auction "process" was followed.

Proposed Order at 11.

**Exception No. 4    ICC Authority under Articles IX and XVI to Approve the  
Filed Tariffs [footnote omitted] – CCSAO's Position: The  
Proposed Order's Citation and Reference Should Be  
Revised**

The Proposed Order in the second paragraph of its overview of the CCSAO position quotes an Illinois Supreme Court Case and does not include the citation, etc. The Proposed Order should be revised as follows:

**Proposed Language:**

CCSAO maintains that the Commission's authority is limited to that provided by Illinois law. As the Illinois Supreme Court noted, "... [t]he sole power of the Commission stems from the statute, and it has the power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute. (citation omitted)..." Union Electric Company v. The Illinois Commerce Commission et al., Illinois Bell Telephone Company v. The Illinois Commerce Commission, 77 Ill.2d 364, 383, 396 N.E.2d 510, 519 (1979).

Proposed Order at 28.

**Exception No. 5    ICC Authority under Articles IX and XVI to Approve the  
Filed Tariffs [footnote omitted] – CCSAO's Position: The  
Proposed Order's Reference to Competitive Suppliers  
Should Be Revised**

The Proposed Order in the fourth paragraph of the CCSAO position notes "...that is no Commission-approved competitive suppliers for residential and small customers to switch to,..." ALJ Proposed Order at 29. However, the CCSAO brief noted that until this summer there have been no competitive suppliers for them to switch to – and did not contend that there were no Commission approved suppliers for residential and small commercial customers. Omitted from this review of the CCSAO argument here was the contention that "...Further, the Commission lacks the authority to do so under current Illinois law..." We propose the following revision:

**Proposed Language:**

CCSAO further asserts that competitive bidding is mentioned in the Act in the context of market prices for such customers after a competitive declaration. Absent legislation, customers whose service has not been declared competitive (residential and small commercial retail customers) should not be exposed to a market price. CCSAO notes that until this summer there were is no Commission-approved competitive suppliers for residential and small customers to switch to, and therefore it would be unjust and unreasonable to expose them to a market price without adequate consumer protections. CCSAO contends that the Commission lacks the authority to do so under current Illinois law.

Proposed Order at 28-29.

**Exception No. 6 ICC Authority under Articles IX and XVI to Approve the Filed Tariffs [footnote omitted] – CCSAO's Position: The Proposed Order Should Include CCSAO Argument on Article XVI and Legislative Intent**

In the summary of the CCSAO position, the Proposed Order at 28-30 omits an argument that the CCSAO makes about the legislative intent. It is critical the ICC look at the detailed approach provided by the General Assembly when attempting to interpret the Act. See CCSAO Initial Brief at 10-11. We request that the Proposed Order be revised to insert the following language before the first full paragraph on page 29 of the Proposed Order (after the paragraph referred to in Exception No. 5) and insert the following:

**Proposed Language:**

CCSAO argues that the General Assembly provided a detailed approach to electric utilities when it adopted the Electric Service and Customer Choice and Rate Relief Law of 1997. 220 ILCS 5/16-101(a). Article XVI provides for how rates shall be handled during the transition period and how they shall be provided for subsequent to the mandatory transition period. 220 ILCS 5/16-111(i).<sup>1</sup> The General Assembly also provided for real time pricing in Section 16-107. 220 ILCS 5/16-107. CCSAO contends that if the General Assembly wanted to provide for pre-approval of an auction and market prices for residential customers before a competitive declaration, it could have said so expressly in the Act. CCSAO further argues that the fact that it did not leads one to the

<sup>1</sup> There appear to be two section 16-111 – one from P.A. 92-537 and one from P.A. 92-690.

conclusion that the Commission lacks the authority to implement an auction process.

Proposed Order at 29.

**Exception No. 7    ICC Authority under Articles IX and XVI to Approve the Filed Tariffs [footnote omitted] – CCSAO's Position: The Proposed Order Should Include CCSAO Argument on Section 16-101A(e)**

One of the failings of the transition has been the failure of the transition to live up to the expectations of Section 16-101A(e). The legislative findings provide assistance in understanding the intent of the General Assembly. The Proposed Order omitted the quote from Section 16-101A(e). The Proposed Order fails to address in a meaningful way the legislative findings. Residential consumers have not benefited from lower costs for electricity that result from retail competition. Further, they are to receive sufficient information to make informed choices among suppliers. How can this be done if until recently, there were no suppliers to choose from? See: page 9 and footnote 10 of CCSAO Initial Brief. The ICC should address this provision and the related issues. The Proposed Order should be amended to include:

**Proposed Language:**

CCSAO asserts that the universe that the legislature sought in the transition and described in its findings does not exist as originally envisioned. CCSAO states that this failure in the marketplace is not something that the Commission can repair in the context of this docket. It is a matter for the legislature. The legislative findings of the Electric Service and Rate Relief Law of 1997 provided:

All consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services. The use of

renewable resources and energy efficiency resources should be encouraged in competitive markets. 220 ILCS 5/16-101A(e).

CCSAO points out that until recently in the transition, there were no competitive retail suppliers approved by the Commission in Illinois for residential customers. As a result, consumers cannot obtain the lower electricity costs that retail competition would purportedly provide. While the findings are not necessarily enforceable, they clearly show the foundation the legislature intended has not developed. CCSAO contends that therefore, any changes should be made in the General Assembly.

Proposed Order at 29.

**Exception No. 8    ICC Authority under Articles IX and XVI to Approve the Filed Tariffs [footnote omitted] – CCSAO's Position: The Proposed Order Should Include Additional CCSAO Argument on the Tariffs Failure to Comply With Article 9 Provisions**

The tariff filed by ComEd does not contain the ultimate price that consumers will pay for electric generation post 2006. How can the ICC based on the record evidence in this docket decide that the resulting charge to consumers will be just and reasonable and in compliance with Illinois law? The Proposed Order needs to comply with the various ratemaking provisions of the Public Utilities Act. , i.e. 220 ILCS 5/Art. IX; 220 ILCS 5/16-111(i). The Proposed Order should be revised to add the following to the section on the CCSAO position on page 29 of the Proposed Order before the last full paragraph on page 29 of the Proposed Order.

**Proposed Language:**

CCSAO argues that the tariffs filed by ComEd need to comply with the various requirements for rates and tariffs in the Public Utilities Act. The requirements of the Act provide basic consumer protections in that they provide an opportunity for the Commission to review the actual rate in the tariff before it takes effect along with the required supporting materials to determine whether the rate in the tariff would be just and reasonable. However, there is no complete actual dollar amount to review in the tariff. ComEd's witness Ms. Juracek

indicated, when asked basically if ComEd had provided a price for generation for the Commission to review in this docket, that there is no specific numeric price for generation and that the price that we are presenting is the price that would result from the auction process. Transcript at 257, lines 8-17 (August 29, 2005). ComEd does not believe that a specific number is required. Transcript at 259, lines 5-6 (August 29, 2005). When basically asked, how would a consumer read the tariff that the Commission is reviewing and know what price they would be paying for electricity – ComEd indicated that until the auction is run and a translation is run there will be no price. Transcript at 259, lines 7-11 (August 29, 2005).

CCSAO contends that the tariff before the Commission in this case raises some of the concerns addressed by the Appellate Court in *Citizens Utility Board and People of Cook County ex rel. Jack O'Malley v. Illinois Commerce Commission and Commonwealth Edison Company*, 275 Ill.App.3d 329, 655 N.E.2d 961 (1<sup>st</sup> District 1995). In that case the Court found that the rate before it violated the filing and publication requirements of the Act. 275 Ill.App.3d at 338. Some of the issues discussed by the Court include: rates the Commission deems just and reasonable, 220 ILCS 5/9-201(c); the filing with the Commission of rates, other charges, classifications and contracts that effect rates, 220 ILCS 5/9-102; schedules shall be produced upon demand of a person, 220 ILCS 5/9-103; and not charging rates other than those on file, 220 ILCS 5/9-240 and 243. See: 275 Ill.App.3d 338-344.

Proposed Order at 29.

**Exception No. 9      Relationship of Illinois and Federal Law and Jurisdiction: The Proposed Order does not include a Section on the CCSAO Position and Should Be Revised to Include the CCSAO Position**

One of the issues in this case is what authority does the Illinois Commerce Commission have with respect to retail electric generation rates in light of Federal law. The CCSAO Initial Brief contained a section on the relationship of Illinois and federal law and jurisdiction that was not included in that section of the Proposed Order. See CCSAO Initial Brief at 16-18. The Proposed Order should be revised to include the following new subsection on page 47:

## **Proposed Language:**

### 5. CCSAO Position

CCSAO asserts that both the Federal law and Illinois law have a role to play with respect to electric power. As a general matter, contracts for the purchase of powers at wholesale are under the purview of Federal law and the FERC. However, the approach at the FERC allows wholesale purchases of power to a utility affiliate in situations other than that proposed by ComEd. The FERC approach on affiliate electric contracts is set forth in *Boston Edison Company Re: Edgar Electric Co.*, 55 F.E.R.C. ¶ 61,382 (1991). *Edgar* held that where a seller seeks to sell wholesale power to a utility affiliate, it must make one of three showings:

- a. evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process;
- b. evidence of the prices which non-affiliated buyers were willing to pay for similar services from the affiliate; or
- c. benchmark evidence that shows the prices, terms and conditions of sales made by non-affiliated sellers.

CCSAO contends that wholesale competitive bidding is only one approach, and occupies no special place. Indeed, the FERC has stated more recently that these three options for demonstrating the reasonableness of an affiliate sale "were not an all-inclusive list; the individual facts of a case could bring forth other examples not expressed in *Edgar* to show that a transaction is without affiliate abuse." *Ameren Energy Generating Co., Union Electric Co., d/b/a AmerenUE*, 108 F.E.R.C. ¶ 61,081, at n.14 (2004).

CCSAO argues that clearly, ComEd has other lawful potential options in terms of wholesale procurement. However, in the ICC forum the issue is not the authority over the wholesale transaction – it is the State's authority over retail rates.

The State of Illinois has the authority to act to protect Illinois consumers with respect to the intra-state issue of retail rates. These are two complementary roles – that of the Federal and that of the State. The Commission should be guided by the approach of the Court in *Pike County Light and Power Company -- Electric Division, Petitioner v. Pennsylvania Public Utility Commission, Respondent*, No. 2736 C.D. 1982 Commonwealth Court of Pennsylvania 77 Pa. Commw. 268, 274-275, 465 A.2d 735, 1983 Pa. Commw. LEXIS 1979 (1983). The Court there noted:



In carrying out its regulatory function, the FERC examines the cost of service data of Orange & Rockland to determine that its wholesale rates provide a fair return to the utility's stockholders without being unfair to Orange & Rockland's purchasers. The FERC does not analyze Pike's cost of service data or purchased power alternatives in making its determination. n5 The FERC focuses on Orange & Rockland to determine whether it is just and reasonable for that company to charge a particular rate, but makes no determination of whether it is just and reasonable for Pike to incur such a rate as an expense. The PUC, on the other hand, has no jurisdiction to analyze Orange & Rockland's cost of service data and makes no determination as to the reasonableness for Orange & Rockland to charge its rates. The PUC focuses on Pike and its cost of service data to determine whether it is reasonable for Pike to incur such costs in light of available alternatives. So while the FERC determines whether it is against public interest for Orange & Rockland to charge a particular rate in light of its costs, the PUC determines whether it is against the public interest for Pike to pay a particular price in light of its alternatives. The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority. n6 [footnotes omitted]

CCSAO contends that while *Pike County* is not an Illinois case, the analysis can serve the Commission to guide it on the role it has with respect to rates. As Pike County illustrates, Illinois has a say on the retail rates that its regulated utilities charge to consumers here in Illinois. CCSAO argues that the Commission needs to ultimately judge ComEd's actions in the retail rate area in light of the options that are available to it. CCSAO also argues that the record on other options fails to adequately present to the Commission the data it needs to make that kind of decision.

Proposed Order at 47.

**Exception No. 10   References to Post-2006 Initiative References and Results: The Proposed Order Should Be Revised to Raise and Address the Concerns of the CCSAO**

CCSAO also objected to the way parties used the Post-2006 Initiative in testimony. Rather than reargue that issue, the basic arguments are contained in the Joint Motion in Limine as well as in an objection raised at the hearing and in our Initial Brief. See: 05-0159, Motion in Limine to Exclude Testimony Regarding the Post 2006 Workshops by the People of The State of Illinois, the

Cook County State's Attorney, the Citizens Utility Board, and Environmental Law and Policy Center of the Midwest, August 23, 2005; CCSAO Initial Brief at 18-20.

The Proposed Order should be revised to exclude the Post -2006 references from the ICC's consideration in this matter. The revisions should begin by inserting the following before the paragraph on page 47 that begins with

"Objections to...":

**Proposed Language:**

The CCSAO also objected to the way parties used the ICC's Post 2006 initiative in their testimony. CCSAO raised arguments in a Joint Motion in Limine.<sup>2</sup> CCSAO also argues that in addition to the concerns raised in the motion, the Commission needs to ask itself if the type of material in the workshops and the reports is the type of material that an expert in the field would reasonably rely on. After all, in *Wilson v. Clark*, the Illinois Supreme Court adopted Federal rules of evidence 703 and 705. 84 Ill. 2d 186, 194, 417 N.E.2d 1322, 1981 Ill. LEXIS 244, 49 Ill. Dec. 308 (1981). The rules have been interpreted to allow opinions based on facts not in evidence. However, care needs to be taken to ensure that facts or data that the expert is relying on is: "...If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence" *Fed. R. Evid. 703...*" CCSAO contends the post 2006 reports and information were hearsay and should not have been admitted into evidence. While, *Wilson v. Clark* could provide an exception to the hearsay rule, the post 2006 information did not meet the standard adopted in *Wilson v. Clark* for an opinion to be based on them.

CCSAO also contends that given the nature of the workshops and the preamble, the views expressed and discussed do not rise to the level that an expert should reasonably rely on. Therefore, the Commission should not have admitted them into the record. Further, even if they were properly admitted – they should be given little or no weight given the context in which they were generated and the lack of consensus on many key points.

Objections to certain references to or characterizations of the Post-2006 Initiative and reports were ruled upon during the course of this proceeding and ~~are not before the Commission in this Order.~~

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<sup>2</sup> 05-0159, Motion in Limine to Exclude Testimony Regarding the Post 2006 Workshops by the People of The State of Illinois, the Cook County State's Attorney, the Citizens Utility Board, and Environmental Law and Policy Center of the Midwest, August 23, 2005.

The Commission believes the Post-2006 Initiative was an innovative and inclusive process that provided a valuable opportunity to explore and develop alternatives on the critical issues relating to post-2006 electric supply acquisition.

Parties who disagreed with the thrust of or characterizations in the references to the Post-2006 process or results thereof were given a full opportunity to express their views in this docket, as they were in the Post-2006 Initiative itself, and their comments have been duly considered. While the ALJ previously denied the motion to exclude, we believe we have the discretion to reconsider that ruling on our own. Accordingly, we believe some of the parties in their testimony improperly used the Post-2006 Initiatives. The workshops, while a valuable tool for trying to develop consensus are not a substitute for proper expert opinion. Given the late hour in this proceeding, we will decline to have the parties re-file their testimony, however we will not consider the references to the Post-2006 process in our decision in this matter.

Proposed Order at 47.

**Exception No. 11 Conclusions Relating to Commission Authority: The Proposed Order Should Be Revised to Adopt the Positions Taken By the CCSAO and Others As Indicated Below; and Prudency Reviews Should Not Be Limited Beyond Applicable Law**

The CCSAO contends that the ICC lacks the authority to pre-approve market based rates for customers whose service has not been declared competitive. Also, the tariffs filed by ComEd do not provide sufficient information to meet the requirements of Illinois law. Rather than reargue this issue we refer to our earlier arguments including the CCSAO Initial Brief, the CCSAO Reply Brief and various motions. See: CCSAO Initial Brief at 6-18; CCSAO Reply Brief at 2-7.

Also, the Commission should reject any attempt to limit a prudency review. The presumption of prudency in the Proposed Order should be eliminated and prudency should be determined based on applicable law.

The Proposed Order should be revised to adopt the arguments made by the CCSAO. The Proposed Order should be revised as follows:

**Proposed Language:**

**E. Conclusions Relating to Commission Authority**

**1. Market-Based Rates for Service not Declared Competitive**

One of the arguments made by AG, CUB and CCSAO is that the PUA "does not authorize market-based rates for electric service that has not been declared competitive under Section 16-113."

As indicated above, ComEd, Staff, CCG, CES and MWIPS contend that this argument should be rejected, as it was in the ruling issued on June 1, 2005 denying a motion to dismiss jointly filed by several parties including AG, CUB and CCSAO. After oral argument, an interlocutory appeal of that ruling was denied by the Commission on July 13, 2005.

On this issue, one of the arguments made by AG, CUB and CCSAO is that, contrary to law, the Proposed Riders "replace cost-based rates with market-based rates" set by an auction. Much of the focus is on Section 16-103(c). It provides in part that ". . . each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997."

Section 16-103(c) goes on to provide:

Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. For those components of the service which have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process. (Emphasis added)

Similarly, Section 16-111(i) provides for the consideration of costs in establishing rates for tariffed services subsequent to the mandatory transition period. Section 16-111(i) also provides "In determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of such electric power and energy is declared competitive, the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112, and, if the electric power and energy component of such tariffed rate exceeds the market value by more than 10% for any customer class, may establish such electric power and energy component at a rate equal to the market value plus 10%." Had the General Assembly wished for the market value to be the just and reasonable price there would have been little point to also including the market value plus 10% analysis. In looking at 16-111(i) it leads one to the conclusion that the Commission lacks the authority to pre-approve the market rate as just as reasonable at this time.

~~As argued by Staff, ComEd and other parties, it is clear from a simple reading of Section 16-103(c), and its numerous references to cost, that market-based prices and cost-based rates are not mutually exclusive concepts. To the contrary, use of market-based prices is recognized as a mechanism for or subset of, not an exception to or "replacement" of, the development of rate components based on cost. That is, use of market-based pricing is identified as one method for determining such costs, not an alternative thereto. In the instant case, ComEd's proposal is intended to recover only such costs as are actually incurred in procuring power and energy through the auction process. How well the proposal is designed to work in that regard is a different question that is addressed elsewhere in this order.~~

Thus, the issue is not whether use of market-based prices is inherently inconsistent with the principle of setting rate components at cost. ~~As indicated above, it is not. While ComEd can clearly in a rate case purchase items at market prices, the Commission cannot determine the justness and reasonableness of these prices without knowing what they are. Ultimately, ComEd will need to justify to the Commission it's the justness and reasonableness of its actual rates and the prudence of its decisions.~~

The next question is whether Section 16-103(c) prohibits the use of an auction or other market-based process in determining the costs of power and energy in setting rates for non-competitive customers, as argued by AG, CUB and CCSAO. ~~A close reading of Section 16-103(c) reveals that no such prohibition exists. What Section 16-103(c) says is that "[f]or those components of the service which have been declared competitive, cost shall be the market based prices." Hence, rate components for competitive services may only be set, not illogically, by using market-based prices to establish cost.~~

~~Implicit in the position advocated by AG, CUB and CCSAO on this issue is the proposition that because market based prices must be used to establish the cost for components of competitive services, it necessarily follows that market-based prices may not legally be used to establish costs on which to base rate components for non-competitive services or customers. However, as indicated by various parties on the other side of this issue, the Act contains no such language, either in Section 16-103(c) or elsewhere. As those parties correctly observe, the presence of a statutory mandate to use a particular method for establishing certain cost components for competitive services does not somehow mean that method is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).~~

~~In addition, as several parties have commented, it is difficult to see by what means AG, CUB and CCSAO envision the cost of procuring power and energy being determined for non-competitive services in a manner consistent with their theory that market-based prices may not be used to establish costs on which to base rate components for non-competitive services. As noted above, Section 16-103(c) contains a broad definition of "market-based prices." It provides that "market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process." (Emphasis added)~~

~~Since ComEd has divested itself of all generation assets pursuant to Section 16-111(g) of the Act, it is unclear how the cost of procuring power and energy would be established for non-competitive services, when existing contracts expire at the end of 2006, if all such market-based mechanisms were prohibited as AG, CUB and CCSAO contend. In other words, prohibiting procurement alternatives that use market-based prices, as that term is defined in Section 16-103(c), would preclude the use of the very alternatives suggested by AG, CUB and CCSAO, such as contracts with ComEd's affiliated generating company. Under that "baby with the bathwater" scenario, utilities without generation would be left with no "legal" means of procuring supply. In the Commission's view, a theory that leads to such a result is not a proper interpretation of the statute.~~

The General Assembly answered that question and, with respect to customers whose service has not been declared competitive – like residential and small business customers- the Public Utilities Act provides for when such consumers shall be exposed to a market price – after a competitive declaration.

The Public Utilities Act provides that:

Notwithstanding any other provision of this Article, each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997. **Upon declaration of the provision of electric power and energy as competitive**, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. **For those components of the service which have been declared competitive, cost shall be the market based prices.** Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a **competitive bidding** or other arms-length acquisition process. 220 ILCS 5/16-103(c) (emphasis added).

Competitive bidding is mentioned in the context of market prices for such customers after a competitive declaration. Absent legislation, customers whose service has not been declared competitive, like residential and small commercial retail customers, should not be exposed to a market price. Clearly, since there have been - until this summer - no Commission approved competitive suppliers for them to switch to, it would be unjust and unreasonable to expose them to a market price without adequate consumer protections.<sup>3</sup> Further, the Commission lacks the authority to do so under current Illinois law.

For the reasons set forth, the theory that the proposed auction is prohibited by Section 16-103(c) of the Act ~~should not be~~ is adopted.

## **2. Transfer of Generation Plants**

As indicated above, CCSAO asserts that ComEd's need to obtain generation is the result of its choice to transfer and sell its generation assets pursuant to Section 16-111(g) of the Act. According to CCSAO, ComEd should have taken additional steps to ensure that it was able to meet its obligations to residential and small commercial customers post-2006 before completing these transactions. In CCSAO's view, the Commission should conclude that ComEd failed to act prudently on behalf of residential ratepayers.

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<sup>3</sup> According to ComEd, it is only recently that a provider received approval from the ICC to service residential and small commercial customers in the ComEd service territory. See Transcript, at 95, lines 16-21 (August 29, 2005). When Mr. Frank Clark, executive vice president and chief of staff of Exelon and president of ComEd was asked if he was aware of any competitive supplier actually providing service to residential or small commercial customers he indicated that there are none. Transcript at 95, lines 2-10 (August 29, 2005). However, on redirect, Mr. Clark indicated that it was his understanding that some of the small commercial customers have switched suppliers. Transcript at 214, lines 7-20 (August 29, 2005).

~~As observed by ComEd, however, this argument is inconsistent with Section 16-111(g). The transfers in question were authorized by the Commission pursuant to Section 16-111(g), which provides, in part, that "[t]he Commission shall not in any subsequent proceeding or otherwise, review such a reorganization or other transaction authorized by this Section . . . ." However, while the transaction cannot be reviewed, the Commission is of the opinion that it can look at the ratemaking issues that result. ComEd knew of its obligations when it transferred the plants and the Commission can look at what steps ComEd took on behalf of ratepayers. Thus, the Commission declines to find finds that ComEd failed to act prudently when it transferred its generation plants pursuant to Section 16-111(g). The Commission will consider the consequences of this finding in the context of when Post 2006 generation rates are set.~~

### 3. Prudency<sup>4</sup>

As explained above, ComEd, Staff and CCG contend that a review of the prudence of the auction process should take place in this docket, not in a post-auction prudency review proceeding. That is, if the process approved in this proceeding is followed in the auction, and the Commission at the conclusion of the three-day review period certifies the auction results, then the acquisitions of supply made pursuant to the auction are deemed prudent and no "after-the-fact" prudency review is either necessary or appropriate.

AG, CUB and CCSAO disagree. Among other things, they argue that under Illinois law, the Commission must assess actual rates, whether they are presented in a rate case under Part 285 and set prospectively, or presented in the context of a retrospective prudency review under section 9-220 of the PUA and subject to refund. The PUA does not authorize the pre-approval of "blank rates" by the Commission under the guise of approving a process. (AG brief at 62-63)

The Commission has reviewed the arguments made and authority cited by the parties. In analyzing this issue, the Commission first observes, generally speaking, that retail rates in Illinois are set through either (1) the Part 285 "test year" ratemaking process or (2) a pass-through rider mechanism.

Some pass-through riders are specifically authorized by statute, such as the UFAC and PGA mechanisms in Section 9-220 of the PUA. Others are not specifically identified by statute, but are authorized by Commission order, such as the "coal tar" riders authorized in consolidated Dockets 01-0080 et al. As discussed above, the Commission's order authorizing coal tar riders was upheld by the Illinois Supreme Court in the Citizens Utility Board case, 166 Ill.2d 111.

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<sup>4</sup> Delete entire section if adopt findings that the ICC has no authority to conduct the auction.



Unlike rates established in a test year ratemaking proceeding, rider mechanisms contain formula rate methodologies designed to pass through costs as they are incurred. Thus, by their very nature, they will not identify specific rates or charges because those charges will not be known until the subject costs are incurred. Therefore, there is no outright prohibition on use of "blank rates" or "formula rates" in pass-through riders. If there were, no such rider could ever be approved. Such a result would be inconsistent with Section 9-220, which authorizes PGA and FAC pass-through riders, and with case law, such as the decisions in Citizens Utility Board and City of Chicago, 13 Ill. 2d 607, before that.

In the instant case, one of the key issues before the Commission is whether use of the auction process to procure electric supply should be subject to annual reconciliation hearings to consider whether the power acquisition costs being passed through to retail customers were prudently incurred.

~~Based on the record in this proceeding, the Commission believes that the proposed vertical tranche auction process, as modified herein, is reasonably designed to enable ComEd to procure power supply in a competitive and least-cost manner. In that regard, no alternatives were presented that represent a more viable approach for procuring power supply after December 31, 2006.~~

As indicated elsewhere in this order, ComEd has divested itself of its generating plant pursuant to Section 16-111(g), and must obtain its power supply from others. ~~The provisions of that section do not appear to contemplate any post-transaction second-guessing of the prudence of those transfers.~~

~~To the extent some parties are arguing ComEd should obtain power at below-market rates from its generating affiliate, that option appears to run afoul of the "Edgar" standard discussed above.~~

As noted above, ComEd, Staff and CCG assert that if the auction process is followed, and the auction results are approved by the Commission at the close of the three-day review period, then the acquisitions of supply made pursuant to the auction should be deemed prudent. They claim any further prudence review of the pass-through of those costs to ratepayers, with no markup or profit, would be pointless and legally unnecessary.

~~Given the record in this proceeding and the findings above, the Commission believes that if the auction results are approved by the Commission at the close of the three-day review period, then ComEd should be entitled to a presumption that the supply obtained pursuant thereto was "prudently purchased."~~

With respect to any prudence reviews after the Commission certification of the auction results, the Commission acknowledges that the recommendation of ComEd, Staff and others to preclude any post-transaction prudence reviews of

auction purchases has practical appeal. Based on the provisions of Section 9-220 of the PUA, however, the Commission believes the better course is to initiate annual reconciliation hearings to address whether the purchased power costs being passed through to ratepayers were "prudent."

The first sentence of Section 9-220(a) provides, "Notwithstanding the provisions of Section 9-201, the Commission may authorize the increase or decrease of rates and charges based upon changes in the cost of fuel used in the generation or production of electric power, changes in the cost of purchased power, or changes in the cost of purchased gas through the application of fuel adjustment clauses or purchased gas adjustment clauses."

Several sentences later, Section 9-220(a) further provides, in part, "Annually, the Commission shall initiate public hearings to determine whether the clauses reflect actual costs of fuel, gas, power, or coal transportation purchased to determine whether such purchases were prudent, and to reconcile any amounts collected with the actual costs of fuel, power, gas, or coal transportation prudently purchased. In each such proceeding, the burden of proof shall be upon the utility to establish the prudence of its cost of fuel, power, gas, or coal transportation purchases and costs."

Since the instant proceeding was not filed pursuant to Section 9-220 and ComEd presently has no fuel adjustment clause in effect, there may be some question as to whether Section 9-220 is directly applicable to the instant proposal, although AG, CUB and CCSAO claim it is. What is clear is that the section speaks directly to "changes in the cost of purchased power", and where applicable, it requires annual hearings to consider the prudence of power purchases being passed through to ratepayers via FAC riders. In the instant case, it undisputed that the supply acquisitions in question are in fact "purchased power."

All things considered, the Commission believes that while the Commission is not precluded from authorizing a pass-through of procurement costs without formal reinstatement of a FAC, Section 9-220 provides appropriate guidance with respect to the procedures that should be followed for reviewing the pass-through of purchased power costs, including purchases made pursuant to the auction. While the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudence, they do not constitute annual public hearings within the meaning of 9-220. Furthermore, ~~while the purported lack of "discretionary conduct" by ComEd in making the auction-driven purchases may be relevant in the evaluation of the auction proposal and in the review of auction purchases, there is no language in Section 9-220 exempting "no discretion" purchases from the annual reconciliation process.~~

Accordingly, the Commission finds that power purchases made pursuant to the auction should be subject to an annual reconciliation proceeding to determine prudence as outlined in Section 9-220. As discussed below, the proceeding will also be used to reconcile amounts collected with actual costs as described in Section 9-220. The Commission should in any proceeding determine the prudence of the actual costs. In the proceeding, parties shall be free to challenge whether the auction was the prudent approach to power in light of other available options.

~~As indicated above, if the auction results are approved by the Commission at the close of the three-day review period, then ComEd should be entitled to a presumption that the supply obtained pursuant thereto was "prudently purchased." At the reconciliation proceedings, if ComEd shows that power purchases were made in accordance with the auction process, ComEd will be deemed to have made a prima facie showing of prudence within the meaning of Section 9-220.~~

Whether the Commission is pre-empted by federal law from conducting a post-transaction review of auction purchases is addressed below.

Proposed Order at 48-53.

**Exception No. 12 PJM/MISO Seam & Joint Operation Agreement. The Commission's Conclusion Should be Modified to Conclude that the Commission believes that the seam between PJM and MISO will affect the competitive environment.**

CCSAO argued that the PJM-MISO seam presents a barrier to the effective trade between regions, running directly across Illinois, separating the wholesale electric markets in Northern Illinois from those in Southern Illinois, thereby denying Northern Illinois residents the benefits of a cohesive, integrated wholesale marketplace for electricity purchase by prospective retail suppliers. Initial Brief at 21. The Commission conclusion that the "seam" between PJM and MISO will not affect the competitive environment in either RTO is incorrect and should be modified as follows:

**Proposed Language:**

**d. Commission Conclusion**

The Commission finds that the PJM-MISO seam consists of the physical transmission interconnections between the two RTOs and that this seam spans over one hundred interconnection points with a nominal non-simultaneous transfer capability on the order of at least 60,000 MW. The Commission finds that the seam between PJM and MISO presents a barrier to effective trade between the regions, running directly across Illinois, separating the wholesale electric markets in Northern Illinois from those in Southern Illinois, thereby denying Northern Illinois residents the benefits of a cohesive, integrated wholesale marketplace for electricity purchase by prospective retail suppliers.

~~The Commission concludes that the "seam" between PJM and MISO will not affect the competitive environment in either RTO. The record shows that such "seam" has diminished, and that the RTOs have already moved towards creating a joint and common market. The RTOs are already operating together under the JOA. The RTOs have the same power flows on the grid and same locational marginal prices, and now have a single transmission rate. The record indicates that even if there were some sort of impediment from a "seam," it would be irrelevant, as the PJM market is more than adequate to support the ComEd's auction, regardless of the accessibility of the MISO market.~~

Proposed Order at 65-66.

**Exception No. 13 Market Characteristics, Including Supplier Concentration – Commission Conclusion: The Proposed Order Should Be Modified to Conclude That Commission has concerns regarding the possible effects on the auction of the concentration of physical generation.**

As CCSAO argued in its Initial Brief, the testimony indicates that the market is not sufficiently competitive, and the foundation for a successful procurement requires a well-functioning, fully competitive wholesale market.

CCSAO Initial Brief 22-25. The Proposed Order should be modified as follows:

**Proposed Language:**

**d. Commission Conclusion**

The Commission finds that the market is not sufficiently competitive, and the foundation for a successful procurement requires a well-functioning, fully

competitive wholesale market. Generation capacity and energy supply concentration in the Northern Illinois region in post-2006 coupled with the pending expiration of the existing ComEd-Exelon contracts for BUS supply will result in the ability of Northern Illinois generation suppliers to exercise market power at times, leading to wholesale market prices that do not reflect competitive market outcomes.

The Commission finds that a generation supplier has the ability to exercise generation market power when its actions have the effect of raising prices above competitive levels for a significant period of time. Concentration of generation ownership gives a supplier or a group of suppliers the ability to either physically or economically withhold generation, resulting in clearing prices higher than those expected in a competitive market. Physical withholding of generation is when a supplier or suppliers reduce the availability of generation to sell or schedule into the physical marketplace, or spot markets. Economic withholding is when a supplier or suppliers increase (above marginal cost) the price at which they are willing to sell into the spot marketplace. In either of these instances, the spot market clearing price will be above the clearing price that would have resulted in a competitive market and the generation owner or owners – and other spot market suppliers – will earn greater revenues than they would have earned in a competitive market. Exelon and Midwest Generation together still account for more than 50% of the installed capacity in the Northern Illinois region, even when taking simultaneous import capacity into account. In Northern Illinois, both the spot market and the forward bilateral markets will be influenced by the exercise of market power. For example, auction participants' perceptions of higher spot market prices will lead to higher bilateral market prices, including those negotiated in advance of the auction, reflecting the expectation that spot prices would be high.

The Commission finds that as long as Exelon is contracted to supply ComEd's BUS needs through December 2006, the high ownership concentration levels in the northern Illinois region are less likely to lead to market power abuse in the PJM spot markets, since Exelon's Northern Illinois capacity is committed to serving the BUS load. However, once that capacity becomes "uncommitted", Exelon is free to either sell into the spot market or negotiate bilateral sales to market participants, without any oversight of the ICC or FERC (if market-based rate authority is granted and/or renewed by FERC). The current load obligation serves to mitigate the likely exercise of market power; but once the load obligation terminates, effective mitigation ceases and the pricing outcomes in both the spot and the proposed auction process will be subject to "highly concentrated" market forces.

The Commission finds that Post-2006, when transmission constraints bind "into" the Northern Illinois region, the ability of non-Northern Illinois generators to effectively compete with Northern Illinois generators is eliminated or at least diminished (considerably so for many generators in PJM who are electrically

distant from the Northern Illinois region). Thus, the relevant market will still be a subset of the broader PJM RTO market during these times, and it is at these times that market power can be exercised in the region.

~~The Commission finds GUB-CCSAO's and the AG's assertions regarding the possible effects on the auction of concentration of physical generation in northern Illinois to be unsubstantiated and contrary to the evidence establishing that bidders will operate in the PJM regional market and will not be limited by physical generation location. Their assertions depend in large part on HHI calculations that are meaningful only in a relevant geographic market. The record shows that northern Illinois does not constitute such a market. ComEd presented two studies showing that the relevant geographic market is the interstate PJM market, of which northern Illinois is just one part. Moreover, even GUB-CCSAO and the AG disclaimed the concept of a separate northern Illinois market. Accordingly, the Commission rejects the AG's call for further analysis.~~

Proposed Order at 69.

**Exception No. 14 Limitations on Generator Entry – Commission  
Conclusion: The Proposed Order Should be Modified to  
Conclude That There Are Limitations on Generator  
Entry.**

As argued in CCSAO's initial brief, Residential and small commercial customers have clearly not benefited from having competitive choices in the retail electric market. CCSAO Initial Brief at 25 – 26. The Proposed Order should be modified as follows:

**Proposed Language:**

**Commission Conclusion**

The Commission concludes that residential and small commercial customers have clearly not benefited from having competitive choices in the retail electric market. In terms of what the General Assembly found when they adopted the choice law, one needs to look no further than their words:

(d) A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service.

(e) All consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services. The use of renewable resources and energy efficiency resources should be encouraged in competitive markets. 220 ILCS 5/16-101A(d), (e)

Retail residential competition has failed so far. When Mr. Frank Clark, executive vice president and chief of staff of Exelon and president of ComEd was asked if he was aware of any competitive supplier actually providing service to residential or small commercial customers he indicated that there are none. Transcript at 95, lines 2-10 (August 29, 2005). However, on redirect, Mr. Clark indicated that it was his understanding that some of the small commercial customers have switched suppliers. Transcript at 214, lines 7-20 (August 29, 2005). When Mr. Clark was asked was he aware of when the first provider received Illinois Commerce Commission approval to service residential and small Commercial customers in the ComEd service territory he did not recall the date yet indicated it is relatively recent. Transcript at 95, lines 16-21 (August 29, 2005).

While one might debate what a timely fashion might be – as the transition is almost over, we are beyond equitable and timely for residential retail competition. Clearly, how to end up with retail competition for the residential customer is a challenging issue.

~~The Commission concludes that there does not appear to be significant limitations on entry of new generators in the PJM market, including northern Illinois. ComEd presented evidence that in the short term, this issue is essentially irrelevant, given excess capacity. Likewise, the record shows that in the long term, generator entry is largely unimpeded. The Commission notes that this capacity for entry is clear from recent experience – in particular, the entry of more than 8,000 MW of new generation.~~

Proposed Order at 71-72.

**Exception No. 15 PJM Market Monitoring Unit - Commission Conclusion:  
The Proposed Order Should Be Modified to Conclude  
That Illinois Has Concerns with the PJM Market  
Monitoring Unit**

The Commission needs to ensure that the Illinois market is properly functioning. One of the keys is to ensure that the market is adequately monitored. PJM market monitoring and mitigation rules are insufficient. Initial Brief at 27. The Proposed Order should be modified as follows:

**Proposed Language:**

**d. Commission Conclusion**

The Commission concludes that the record tends to show concerns with the effectiveness of PJM's MMU as the last line of defense against market manipulation. Among other things, the MMU continuously monitors the market, has multiple methods for preventing efforts to drive prices up artificially through withholding, and has processes for addressing any issues that do arise. In addition, the record demonstrates that the FERC performs additional monitoring and that the MMU and the FERC work together in these regards. However, the Commission is not persuaded by the AG's and the CCSAO's assertion that the MMU is not effective, as such assertion does not square with the evidence. Accordingly, the Commission concludes that PJM's MMU alone will not be an adequate safeguard for the Illinois Auction Proposal. Illinois needs to take steps to protect consumers and ensure its market is function. An Illinois market monitor to supplement the work being done by PJM and others should be put in place.

Proposed Order at 77.

**Exception No. 16 Proposed Illinois Market Monitor: The Proposed Order  
Should Adopt an Illinois Market Monitor Unit**

As noted in our initial brief, the testimony by Robert Fagan showed market flaws and a reason to be concerned with the Illinois wholesale market. Further, Dr Steinhurst recommended the creation of a State level entity. CCSAO Initial Brief at 27. The Proposed Order failed to recognize the concerns with the Illinois



market and the importance of an Illinois Market Monitor Unit. The Proposed Order should be modified to provide for an Illinois Market Monitor Unit.

**Proposed Language:**

**3. Proposed Illinois Market Monitor**

CUB-CCSAO suggest that a separate Illinois Market Monitoring Unit ("IMMU") be established that would review the effectiveness and competitiveness of the PJM market structure and would have access to confidential market data to monitor detect and potential market power and take action to prevent or eliminate abuse. CUB-CCSAO asserts that potential remedies would include petitioning RTOs, the FERC, or the U.S. Department of Justice to take action. They also assert this IMMU could have authority beyond RTO-administered markets into broader investigations of energy industries.

ComEd states that in effect, CUB-CCSAO is proposing an Illinois entity to do a job the PJM MMU was already tasked to do. ComEd notes multiple problems with this proposal. First, there is no source of authority – and CUB-CCSAO suggested none – for an Illinois entity to monitor transactions in wholesale power markets in interstate commerce, transactions that are by federal statute subject to the exclusive jurisdiction of the FERC. In addition, ComEd notes that CUB-CCSAO's proposal adds nothing to the scope of the markets being monitored, since under the Illinois Auction Proposal ComEd and other restructured utilities will be purchasing resources on the monitored wholesale market anyway. ComEd further notes that for reasons noted above, there is no need for the proposal, as its purported function already is being performed adequately by the PJM MMU and the FERC. In addition, ComEd notes, if there are criminal violations, the U.S. Department of Justice, the various United States Attorneys' offices, and state prosecutorial authorities have authority to enforce the law.

~~The Commission does not see the need for another monitor at this time. If in the future, it appears that the PJM MMU or FERC is not providing sufficient oversight the Commission may revisit this issue.~~ The Commission agrees with the concerns of the CCSAO that an Illinois Market Monitor Unit should be created. The Illinois Attorney General's Office shall be the Illinois market monitor. In this role, the Illinois Attorney General's Office shall be allowed to monitor each and every stage of the procurement process for Illinois retail customers and be provided access to all information. Additionally, the Commission will continue to exercise its authority as may be appropriate to monitor the ongoing procurement processes.

Proposed Order at 78.

**Exception No. 17 Auction design issues - General Effectiveness and Suitability – Commission Conclusion: The Proposed Order's Conclusion Should Be Revised to Reject the Auction**

As noted in our initial brief, the Commission should reject the auction. CCSAO Initial Brief at 28-32. The Conclusion in the Proposed Order should be revised to adopt the CCSAO position and reject ComEd's proposal.

**Proposed Language:**

**7. Commission Conclusion**

~~The Commission finds that the vertical tranche auction proposed by ComEd is an appropriate competition procurement method for securing power supply for the needs of ComEd customers.~~

The Commission finds that the Commission's pre-approval of the vertical tranche auction proposed by ComEd is not within the Commission's authority for customers whose service has not been declared competitive. As demonstrated by the CCSAO it is ComEd's responsibility to procure power for residential and small commercial customers under the Commission's oversight. Ultimately, the day may come when an auction is an appropriate procurement method in Illinois. However, absent legislation, market improvement and appropriate consumer protections that day is not today.

Proposed Order at 81.

**Exception No. 18 Role of ComEd: The Proposed Order Needs to Better Address the Role of ComEd to Ensure Conflicts or the Appearance of Impropriety Are Avoided**

The CCSAO in its initial brief noted that the Commission needs to ensure that adequate protections are put in place to protect consumers and prevent any conflict of interest or the appearance of impropriety. CCSAO Initial Brief at 33-34. The Proposed Order fails to note the concern of the CCSAO in this section or address it in a meaningful way. The Proposed Order should be revised as follows:

**Proposed Language:**

**b. Commission Conclusion-CCSAO Position**

CCSAO notes that ComEd has a role to play in the auction, since the power is being procured to, among other things, meet its obligations to consumers. CCSAO contends that care needs to be taken to avoid conflicts of interest and the appearance of any impropriety in the design and management of the auction. ComEd's president is also the executive vice president and the chief executive officer of Exelon. ComEd Ex. 1.0 Direct at 1, lines 5-6 (Clark). Exelon Generation currently provides electricity for ComEd. Transcript at 74, lines 4-10 (August 29, 2005). The best thing for the Generation part of the company may not always be the best thing for ComEd's ratepayers. CCSAO concludes that the Commission needs to ensure that adequate protections are put in place to protect consumers and prevent any conflict of interest or the appearance of impropriety.

**c. Commission Conclusion**

It is important that the Auction Manager function independently of any particular party, so as to maintain the fairness of the auction and to keep it free of any bias. As noted above, ComEd have agreed to certain measures to help promote that independence. However, the Commission recognizes more needs to be done to ensure the independence of the process and to avoid a conflict of interest or even the appearance of impropriety. The Commission will ensure the integrity and independence of the process through its Staff, the Illinois Auction monitor and the consumer observer. Further, if additional steps need to be done we will take them in future reviews of the auction. The Commission therefore approves ComEd's proposed level of involvement in the auction process.

Proposed Order at 102.

**Exception No. 19 Representation of Consumer Interests/Separate Consumer Observer – Commission Conclusion: The Proposed Order Should Be Revised to Provide for a Consumer Observer if the Commission Does Not Reject the Auction**

The Proposed Order rejected the role of a consumer observer advocated for by the CCSAO in its initial brief. Consumers need confidence in the process. The Commission should reconsider and provide for a consumer observer as described in the testimony of Dr. Steinhurst. See: CCSAO Initial Brief at 34-35.

**Proposed Language:**

**e. Commission Conclusion**

Staff has extensive experience and expertise in working to protect customer interests. The auction process envisions a full and active role for Staff in providing such a function, and Staff has indicated its willingness to perform it. However, given the concerns raised by the CCSAO In light of the broad range of this function, including the provision of post-auction reports and recommendations, the Commission concludes that there is no reason to establish a separate consumer advocate at this time. The Commission shall appoint a consumer advocate to take on the role advocated by the CCSAO and set out in Dr. Steinhurt's testimony.

Proposed Order at 104.

**Exception No. 20 Contract Durations for Blended, Fixed Price Product - Proposed Blends for Residential and Small Commercial Customer Supply - CCSAO's Position Should be Removed from the Proposed Order**

The CCSAO did not brief section H of the Proposed Order, yet the order contains a section on the CCSAO position. The CCSAO contends that the information in the CCSAO position should be removed from this section of the Proposed Order. CCSAO Initial Brief at 36.

**Proposed Language:**

**c. ~~CCSAO's~~ CCSAO's Position**

~~CCSAO is concerned with ComEd's procurement proposal noting that ComEd focuses on the implementation details of an auction while glossing over the fundamental question of whether other options would better serve the public interest. CCSAO asserts that in this proceeding, ComEd has presented a single option for the Commission's consideration, an option that relieves the Company of the greatest part of its responsibility for the results of its power procurement decision.~~

~~CCSAO urge the Commission to reject ComEd's proposal; open a new docket to consider the full range of procurement options; and affirm that, regardless of which procurement method is employed, retail rates remain subject to traditional regulatory standards of justness and reasonableness, which entail a prudence review of the company's decisions.~~

~~CCSAO argues that the Commission should recognize that the Company retains responsibility for making and managing the decisions and actions necessary to serve default service customers and should clarify that the Commission will ensure, as part of its oversight responsibility, that the Company has done so in a manner that best serves default service customers. CCSAO further argues that the Commission needs to put ComEd's auction proposal in context. One of ComEd's experts, Dr. Chantale LaCasse has been employed at NERA since 2001 and has been employed at least four times by a utility or company working in the electric industry. CCSAO states that while the auction has been used in New Jersey and attempted in Ohio — it has not been proven in this case to meet the requirements of the Public Utilities Act.~~

Proposed Order at 113-114.

**Exception No. 21 Three-day Post-Auction Commission Review of Results  
– Commission Conclusion: The Proposed Order Should  
Be Revised to Ensure Compliance With Illinois Law**

The Proposed Order fails to adequately address the concerns by the CCSAO with the three-day review of the auction. As noted in the CCSAO initial brief, no meaningful review to ensure compliance with Illinois law can be done in three days to ensure that rates are just and reasonable. See: CCSAO Initial Brief at 37-38. In the event that the ICC does not reject the auction, care needs to be taken to ensure consumer rights are protected and Illinois law is complied with. Failure to act in the three days shall not bar future action under Illinois law. The Proposed Order should be revised as follows:

## **Proposed Language:**

### **i. Commission Conclusion**

Previously, in Section III.E., the Commission stated its conclusions regarding prudency reviews. The parties' positions as summarized here were considered in reaching those conclusions.

As explained above, Constellation Energy Commodities Group urges the Commission to clarify the scope of the post-auction review so that it focuses on ensuring that the Commission's approved auction process is followed and that no "anomalies were found in the bids or process that would call into question the competitiveness of the bids received." That way, CCG reasons, the potential bidders would have confidence that the auction will result in executed SFCs.

Similarly, Morgan Stanley Capital Group believes the tariffs should provide, "The ICC will take formal action regarding the auction results as described herein only if the conduct or competitiveness of the Auction or outside events are believed to have compromised the Auction process." Without this clarification, MSCG contends, bidders face risk that may be reflected in higher offer prices.

ComEd, Staff and the AG disagree with those recommendations. ComEd argues in part that the Commission should not be constrained by the prescriptive standards advanced by CCG and MSCG. In Staff's view, CCG's and MSCG's arguments should be rejected so that the Commission will have the flexibility that is necessary to address the unknown. The AG believes the Commission should not limit its ability to respond to unforeseen or anomalous circumstances.

Having reviewed the positions of the parties, the Commission concludes that the language proposed by CCG and MSCG should not be adopted. While the review should focus on the issues cited by those parties, the Commission agrees with other parties that the restrictiveness of the language would deprive the Commission of needed flexibility. Furthermore, the brevity of the Commission's review period, consisting of three working days, should help alleviate the alleged risks, and MSCG offered no prepared testimony to the contrary. The Commission retains the full range of options under the Public Utilities Act with respect to the auction and its results. Failure to take any action in the three days should not preclude the Commission or others from utilizing the options available under Illinois law to challenge the auction or the resulting rates.

Proposed Order at 144.

**Exception No. 22 Procurement processes alternatives – Commission Conclusion: The Proposed Order Should Be Revised and the Commission Should Consider Alternatives**

In terms of procurement process alternatives, the Commission should consider other alternatives in a contested case before adopting a particular proposal. CCSAO Initial Brief at 38. Given the absence of actual numbers in ComEd's proposal it is challenging to see how one could determine that the auction is superior to other potential approaches. The Proposed Order should be revised as follows:

**Proposed Language:**

**5. Commission Conclusion**

The Commission finds at this time that it is unable to conclude that the auction proposal is a better procurement method than an active portfolio or any other procurement method. The record fails to adequately demonstrate which procurement method is best for Illinois ratepayers.

Proposed Order at 162.

**Exception No. 23 Illinois Open Meetings Act: The Proposed Order Should Be Revised to Deal With Issues Under the Illinois Open Meetings Act**

The Proposed Order fails to adequately address concerns raised by the CCSAO that the auction proposed by ComEd fails to adequately consider the Illinois Open Meetings Act. See CCSAO Initial Brief at 42-43. The Proposed Order should be revised as follows:

**Proposed Language:**

**1. Illinois Open Meetings Act**

The CCSAO raised concerns that the auction proposed by ComEd fails to adequately consider the Illinois Open Meetings Act. As a general matter, in the context of the auction, any discussions that three or more Commissioners have

need to be done publicly in an open meeting. For example, how will the auction manager confer with the Commission on any major decisions that may need to be made during the auction? What about confidential information? ComEd's proposed auction contemplates that certain information like certain benchmarks to remain confidential throughout the process and not be reported after the auction is completed. If the Commission is considering rejecting the result based on some of this confidential information, how will the Commissioners be able to discuss this and related issues in public? These have not been adequately addressed in the proposal and in the event that the Commission approves an auction, they need to be more completely addressed.

The Open Meetings Act requires that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." (5 ILCS 120/2(a)) A "meeting" is defined as "any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." (5 ILCS 120/1.02)

Absent a change in the law it is difficult to see how the Commission would be able to meet the needs of how an auction works and comply with the Illinois Open Meetings Act. The auction process needs to ensure that its interaction with the Commission complies with the Act. There is nothing in the Open Meetings Act that is inconsistent with the Illinois Auction process and there is no reason to assume that the Commission will fail to comply with the requirements of that act. The auction is conducted by an independent auction manager in accordance with a process specified in a tariff approved by the Commission. While the Commission itself does not conduct the auction, it is actively involved in the management and the decision-making. This needs to be done in compliance with Illinois law. The Commission does not conduct the auction. To the extent that the Commission holds any meetings to take any action with respect to the auction or the results of the auction, it will comply with the provisions of the Open Meetings Act.

Proposed Order at 236-237.

**Exception No. 24 The Illinois Ethics Law: The Proposed Order Needs to Be Revised to Address Concerns With Compliance with the Illinois Ethics Law**

As noted in the CCSAO initial brief it is challenging to see how the auction proposal will be implemented and be in compliance with the Illinois Ethics Law.

See CCSAO Initial Brief at 43-44. Contrary to the narrow approach in the

Proposed Order the Ethics Law covers more than just pending matters. 5 ILCS



430/5-50(e). The Proposed Order fails to adequately consider the effect of the disclosure and ethics rules on the auction process. The Proposed Order should be modified as follows:

**Proposed Language:**

**2. The Illinois Ethics Law**

The Illinois Ethics Law defines an ex parte communication as:

any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment, or licensing matters pending before or under consideration by the agency.

5 ILCS 430/5-50 (b) (emphasis added)

~~The Illinois Auction is run by an independent auction manager in accordance with a process specified in a tariff approved by the Commission. The auction is not a matter "pending before or under consideration by" the Commission. It is challenging to see how this provision will not effect the implementation of the auction proposal. In the event that any matters relating to the auction or its results do become the subject of a regulatory, quasi-adjudicatory, investment, or licensing matter pending before or under consideration by the Commission, the agency will comply with the requirements of the Illinois Ethics Law.~~

Proposed Order at 237.

**Exception No. 25 Regulation of Public Records: The Proposed Order Should be Revised to Highlight Concerns with Public Records**

The Proposed Order incorrectly narrows the potential applicability of Section 10-101 of the Public Utilities Act. The Commission will ultimately be called upon to approve the auction. The evidence presented to the Commission in this proceeding will be public records. The Proposed Order should be revised as follows:

**Proposed Language:**

The regulation of public records provision, 220 ILCS 5/10-101, appears under Article X of the Public Utilities Act entitled: Proceedings Before the Commission and the Courts. Section 10-101 itself begins:

The Commission, or any commissioner or hearing examiner designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish . . . . Complaint cases initiated pursuant to any Section of this Act, investigative proceedings and ratemaking cases shall be considered "contested cases" as defined in Section 1-30 of the Illinois Administrative Procedure Act (5 ILCS 100/1-30).

**220 ILCS 5/10-101**

The language of 220 ILCS 5/10-101 applies to "investigations, inquiries, and hearings." In other words, it applies to "contested cases" or other formal proceedings before the Commission. Ultimately, since the Commission will be called up to make decisions with respect to the auction and approve the auction, all records in these cases shall be ultimately be public.

~~As previously explained, an independent auction manager manages the auction process. It is not an investigation, inquiry or hearing before the Commission. In the event that any matters relating to the auction or its results do become the subject of an investigation, inquiry or hearing, the Commission will comply with the regulation of public records provisions of the law.~~

Proposed Order at 237-238.

**Exception No. 26 Ex Parte Communications: The Proposed Order Should be Revised to Highlight Concerns with Ex Parte Communications**

The Proposed Order incorrectly narrows the potential applicability of the various Ex Parte Communication provisions. The Proposed Order should be revised as follows:

**Proposed Language:**

#### 4. Ex Parte Communications

The Public Utilities Act states in part that “[t]he provisions of Section 10-60 of the Illinois Administrative Procedure Act shall apply in full to Commission proceedings.” 220 ILCS 5/10-103. The Illinois Administrative Procedures Act is limited to contested cases before the Commission. The relevant portion of the statute states:

Except in the disposition of matters that agencies are authorized by law to entertain or dispose of on an ex parte basis, agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or the representative of any party, except upon notice an opportunity for all parties to participate.

5 ILCS 100/10-60 (a) (emphasis added)

The Illinois Auction is not a “contested case” under the Illinois Administrative Procedures Act. “Contested case” is defined as follows:

“Contested case” means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

5 ILCS 100/1-30

The Public Utilities Act expands the definition of “contested case” to include investigative proceedings and rate cases (see 220 ILCS 5/10-101). ~~However, the Illinois Auction is not an investigative proceeding or a rate case. In the event that any matters relating to the auction or its results do become the subject of an investigative proceeding or a rate case, I~~the Commission will comply with the requirements of 220 ILCS 10-103.

Proposed Order at 238.

**Exception No. 27 Decisions of the ICC Being Based on Record Evidence:  
The Proposed Order Incorrectly Narrows the Nature of  
the Commission's Involvement in the Auction and the  
Applicable law**

The Proposed Order incorrectly concludes that the Illinois Auction is not a proceeding, investigation or hearing conducted by the Commission. At some point the Commission may be required to make decisions during the process and ultimately will be approving the results. Clearly, this needs to be done in compliance with Illinois law. The Proposed Order should be modified as follows:

**Proposed Language:**

Cook County also raised the concern that, in "proceedings, investigations or hearings conducted by the Commission," decisions are required to be made on record evidence as defined in 220 ILCS 5/10-103. ~~The Illinois Auction is not a proceeding, investigation or hearing conducted by the Commission. In the event that any matters relating to the auction or its results do become the subject of a proceeding, investigation or hearing conducted by the Commission, There is no auction exception articulated in the above provision and the Commission needs to ensure that any procedure proposed by ComEd complies with it. It would be challenging to see how ComEd's post auction review and order comply with Section 10-103 and similar requirements. Potential parties are entitled to notice and an opportunity to be heard consistent with the Public Utilities Act and Commission rules before approve an order based on the auction. Further, the order needs to be based on record evidence. Tthe Commission will comply with the record evidence requirement.~~

Proposed Order at 238-239.

**Exception No. 28 FINDINGS AND ORDERING PARAGRAPHS: The  
Proposed Order Should be Revised to Reject the  
Auction**

The Proposed Order should be revised to reject the auction. The following changes should be made to the Proposed Order.

**Proposed Language:**

**X. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the retail sale and delivery of electricity to the public in Illinois, and is a "public utility" as defined in Section 3-105 of the Public Utilities Act and an "electric utility" as defined in Section 16-102 of the Public Utilities Act;
- (2) the Commission has jurisdiction over the parties and the subject matter herein;
- (3) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record, and are hereby adopted as findings of fact and conclusions of law;
- (4) the Commission has authority under the Public Utilities Act to establish reasonable rates and charges for retail service, however the record in the case fails to establish that the rates are reasonable for non competitive customers including Rider CPP and PPO-MVM as modified in this Order;
- (5) the Commission lacks has the authority to approve the competitive procurement process and the associated tariffs for customers whose service has not been declared competitive, subject to the conditions imposed for procurement of power and energy;
- (6) ~~the tariff proposed by ComEd in its initial filing, as modified to reflect the findings herein, are just and reasonable, and ComEd should be authorized to file and put into effect such tariff sheets, as modified;~~
- (7) ~~the new tariff sheets authorized to be filed by this Order should reflect an effective date not less than 30 days after the date of filing, with the tariff sheets to be corrected, if necessary, within that time period, and should reflect an operational date of no earlier than January 2, 2007;~~
- (8) ~~ComEd should be subject to the annual reconciliation proceedings related to its power purchases as described and approved in the prefatory portion of this Order; and~~

- (9) ~~ComEd should be required to implement the rate mitigation proposal described and approved in the prefatory part of this Order.~~

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed tariff sheets to implement a competitive procurement process for customers whose service has not been declared competitive by establishing Rider CPP, Rider PPO-MVM, and Rider TS CPP and revising Rider PPO-MI, filed by Commonwealth Edison Company on February 25, 2005, are permanently canceled and annulled.

~~IT IS FURTHER ORDERED that Commonwealth Edison Company is authorized and directed to file new tariff sheets with supporting work papers in accordance with the Findings of this Order, applicable on and after the effective date of said tariff sheets and operational on and after January 2, 2007.~~

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding that remain unresolved are disposed of consistent with the conclusions herein.

~~IT IS FURTHER ORDERED that Commonwealth Edison Company shall be subject to the annual reconciliation proceedings related to its power purchases as described and approved in the prefatory part of this Order.~~

~~IT IS FURTHER ORDERED that Commonwealth Edison Company is directed to file tariffs that implement the rate mitigation proposal described and approved in the prefatory part of this Order.~~

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

Proposed Order 240-242.

## **Conclusion**

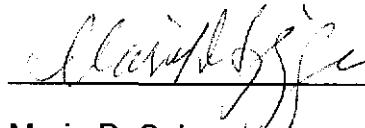
We respectfully ask that the Commission revise the Proposed Order consistent with the CCSAO Brief on Exception, Initial Brief, Reply Brief and other pleadings and arguments. Further, that the order reject ComEd's proposal to pre-approve an auction and the resulting rates for customers whose service has not been declared competitive. The Commission needs to ensure that any new rates, be just and reasonable and done in compliance with Illinois law and subject to Commission oversight. Further, that the ICC takes all necessary action to accomplish the above.

Respectfully submitted,

**RICHARD A. DEVINE,  
STATE'S ATTORNEY OF COOK COUNTY**

December 16, 2005

By:



Marie D. Spicuzza  
Assistant State's Attorney

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